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No. 16-1540 (16A1191)

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, ET AL.,
Petitioners,

v.

STATE OF HAWAI'I, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN OPPOSITION TO PETITIONERS' MOTION AND STAY APPLICATION

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS

Pursuant to Supreme Court Rule 37.2(b), *amici* respectfully move this Court for leave to file the accompanying brief supporting the State of Hawaii and Dr. Ismail Elshikh. Both parties have consented to the filing of this brief.

Amici Senator Christopher Coons and Representative Zoe Lofgren led the effort that produced an *amici curiae* brief joined by 165 Members of Congress that was filed in support of plaintiffs in the Ninth Circuit in *Hawaii v. Trump*. They are familiar with the Immigration and Nationality Act ("INA") and other laws passed by Congress related to immigration and national security concerns. They are also familiar with the interplay between those laws and constitutional protections for both U.S. citizens and noncitizens.

Amici thus have a strong interest in—and are particularly well-situated to provide the Court with insight into—the proper interpretation of the INA. They are also committed to ensuring that our immigration laws and policies not only help protect the nation from foreign and domestic attacks, but also comport with fundamental constitutional principles and statutory constraints on the authority of the Executive Branch.

Amici therefore seek leave to file the attached brief urging the Court to uphold the district court's decision enjoining the Executive Branch guidance recently issued to implement this Court's order in *Trump v. International Refugee Assistance Project*,

137 S. Ct. 2080 (2017) (per curiam). In their proposed brief, *amici* explain that the Executive Branch has erroneously relied on provisions of the INA—in particular, INA Section 201's definition of "immediate relatives"—that allow a limited set of individuals to sponsor family members for permanent residence in the United States. They also explain that the Administration's guidance unlawfully excludes refugees who have a formal assurance from a refugee resettlement agency, even though such individuals have a "bona fide relationship with . . . [an] entity in the United States," as required by this Court's order.

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INTEREST OF *AMICI CURIAE*[1]

Amici Senator Christopher Coons and Representative Zoe Lofgren led the effort that produced an *amici curiae* brief joined by 165 Members of Congress that was filed in support of plaintiffs in the Ninth Circuit in *Hawaii v. Trump*. They are familiar with the Immigration and Nationality Act ("INA") and other laws passed by Congress related to immigration and national security concerns. They are also familiar with the interplay between those laws and constitutional protections for both U.S. citizens and noncitizens.

Amici thus have a strong interest in—and are particularly well-situated to provide the Court with insight into—the proper interpretation of the INA. They are also committed to ensuring that our immigration laws and policies not only help protect the nation from foreign and domestic attacks, but also comport with fundamental constitutional principles and statutory constraints on the authority of the Executive Branch.

Amici therefore urge the Court to uphold the district court's decision enjoining the Executive Branch guidance recently issued to implement this

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. *Amici* have also submitted a motion for leave to file this brief. No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of any portion of this brief.

Court's order in *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (per curiam). *Amici* submit this brief to explain that the Executive Branch has erroneously relied on provisions of the INA—in particular, INA Section 201's definition of "immediate relatives"—that allow a limited set of individuals to sponsor family members for permanent residence in the United States. *Amici* further submit this brief to explain that the Administration's guidance unlawfully excludes refugees who have a formal assurance from a refugee resettlement agency, even though such individuals have a "bona fide relationship with . . . [an] entity in the United States," as required by this Court's order.

SUMMARY OF ARGUMENT

On March 6, 2017, President Donald Trump signed Executive Order 13,780, which, among other things, suspended entry into the United States of foreign nationals from six Muslim-majority countries. In two separate lawsuits, Respondents obtained preliminary injunctions barring enforcement of a number of the Executive Order's provisions. On June 26, 2017, this Court held that those injunctions should remain in place as to "respondents and those similarly situated." *See IRAP*, 137 S. Ct. at 2087. It granted the Government's request for a stay only "to the extent the injunctions prevent enforcement . . . with respect to foreign nationals who lack any bona fide relationship with a person or entity in the United States." *Id.* This Court further explained that, for entry into the United States based on family connections, a "bona fide relationship with a person"

requires "the sort of relationship" enjoyed by Respondents—that is, "a close familial relationship." *Id.* at 2088.

Following issuance of this Court's order, the Administration issued new guidance that interpreted "close familial relationship" based on provisions of the INA that allow a particular set of individuals to sponsor aliens for permanent residence. That interpretation fundamentally misconstrues both the Court's order and the statute. The Administration's new guidance also excluded from the protection of the preliminary injunctions refugees who have a formal assurance from a refugee resettlement agency. That interpretation, too, is at odds with this Court's order. This Court should reject the Government's interpretations and ensure that interim injunctive relief remains available for those with a "credible claim of a bona fide relationship with a person or entity in the United States." *Id.*

First, according to the Administration's guidance, grandparents, grandchildren, brothers-in-law, sisters-in-law, aunts, uncles, nieces, nephews, and cousins of persons in the United States are categorically barred from the injunctions' protection. That interpretation is at odds with this Court's order. Far from requiring ties limited to the traditional "nuclear" family, the Court's order juxtaposes those who possess the requisite relationship against "foreign nationals abroad who have no connection to the United States at all." *Id.* Moreover, this Court's prior decisions in other contexts confirm that "close familial relationships"

are not limited to the bonds between immediate family members. *See infra* at 6-7.

Second, the Administration's reliance on Section 201 of the INA—in particular, that Section's definition of "immediate relatives"—is misplaced. That statute applies in the unique context of the sponsorship of relatives' *permanent relocation* to the United States. By contrast, the provisions of the INA allowing for *temporary* stays do not require that the visa applicant have a particular type of relative in the United States; indeed, they require no relationship with persons in this country at all. But the Administration's interpretation of this Court's order would bar individuals who do not fall within a certain limited list of relationships from even making temporary trips to the United States to visit their relatives.

Third, refugees with a formal assurance from a refugee resettlement agency in the United States have the requisite "bona fide relationship with . . . [an] entity in the United States," as required by this Court's order, *IRAP*, 137 S. Ct. at 2087. Given that refugee resettlement agencies regularly provide formal assurances to refugees—indeed, doing so is central to their work—there can be no question that such relationships are "formed in the ordinary course, rather than for the purpose of evading" the Executive Order. *Id.* at 2088. Moreover, those resettlement agencies would suffer precisely the sort of "concrete hardship," *id.* at 2089, that this Court contemplated if their extensive preparations for hosting a refugee were stymied because the refugee's entry into the country has been blocked.

In sum, the Administration's guidance is at odds with both this Court's order and the INA, and its arbitrary line-drawing should be rejected.

ARGUMENT

A. The Administration's Guidance on What Familial Relations Are Sufficiently "Close" To Be Covered By the Preliminary Injunctions Is at Odds with this Court's Order.

According to the Administration, this Court intended to immediately subject to the Executive Order's prohibitions on entry to the United States anyone who is not "a parent (including parent-in-law), spouse, child, adult son or daughter, son-in-law, daughter-in-law, sibling, whether whole or half," including "step relationships."

In holding that preliminary injunctive relief should remain in place with respect to those who have a "close familial relationship" with a person in the United States, this Court was elaborating on its earlier statement that all persons similarly situated to Respondents—that is, those persons with a "bona fide relationship" with individuals in the United States—should remain protected. A "bona fide" relationship is one "[m]ade in good faith; without fraud or deceit," or a "[si]ncere; genuine" relationship." Black's Law Dictionary 199 (9th ed. 2009). There is no reason to think that grandparents, aunts, uncles, grandchildren, and others whom the Administration now plans to categorically exclude necessarily lack such a "bona fide" relationship. A grandparent seeking to enter

the country is not, critically, "someone who [is] enter[ing] into a relationship simply to avoid" the Executive Order's restrictions. *IRAP*, 137 S. Ct. at 2088.

Moreover, it bears emphasis that this Court contrasted the group of family members who remain protected by the preliminary injunctions—those with "close familial relationships"—not with those who have more distant familial relationships, but with those individuals "who have *no connection to the United States at all.*" *Id.* (emphasis added); *see id.* ("a foreign national who lacks *any connection* to this country"); *id.* ("when there is *no tie* between the foreign national and the United States"); *id.* (foreign nationals who lack "*some connection* to this country"); *id.* ("foreign nationals *unconnected* to the United States") (emphases added). By excluding from interim equitable relief individuals who have "no connection to the United States at all," this Court strongly implied that relatives who *do* have a genuine connection to the United States—as those relatives who are categorically excluded often will—remain protected.

This understanding of what constitutes a "close familial relationship" accords with this Court's decisions in other contexts. For instance, this Court has recognized that an individual suffers a constitutionally cognizable injury if the Government interferes with his relationship with his "uncles, aunts, cousins, and especially grandparents," all of whom it has expressly described as "close relatives." *Moore v. City of E. Cleveland*, 431 U.S. 494, 504 (1977); *see Tooahnippah v. Hickel*, 397 U.S. 598, 608

(1970) (noting that a testator had a "close and sustained familial relationship with his niece and had resided in her home"); *cf. Reno v. Flores*, 507 U.S. 292, 310 (1993) (in identifying custodians to whom detained juveniles could be released, INS listed not only parents, but also "other close blood relatives, whose protective relationship with children our society has also traditionally respected").

B. The Government Erroneously Relied on the INA's Immigrant Visa Provisions in Interpreting this Court's Order.

Against this backdrop, there is no support for the Administration's assertion that this Court's equitable judgment was guided by any technical definition of "family" imported from the INA—let alone the specific statutory provisions upon which the Administration now relies.

Significantly, the INA does not contain a monolithic concept of "family" that applies across all contexts. To be sure, Section 201, which governs the sponsorship of individuals for permanent relocation to the United States, uses the term "immediate relative" and defines it relatively narrowly to include "the children" (specifically, unmarried children under the age of 21), "spouses, and parents of a citizen of the United States." 8 U.S.C. § 1151(b)(2)(A)(i). Sections 201 and 203 also allow U.S. citizens to sponsor siblings and children (both married and unmarried) who are age 21 or older and lawful permanent residents to sponsor spouses

and unmarried children. *Id.* §§ 1151(a), 1153(a). But those provisions apply only in the specific context of seeking lawful permanent residence in the United States. In other words, they apply specifically to U.S. citizens and lawful permanent residents who apply to gain permanent entry for alien family members.

It is unsurprising that the INA might define family relationships narrowly in this specific context, given all of the consequences that permanent relocation entails, including the Government's potential responsibility to provide care to individuals whose sponsors are unable to provide such support.[2] Other provisions of the INA do not require such a close familial connection. For instance, there are no similar restrictions placed on those visiting their family in the United States on short-term non-immigrant visas (such as "B" visas). *See* 8 U.S.C. § 1101(a)(15)(B).[3] Indeed, neither the INA nor its

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[2] Permanent resident status allows a noncitizen to "remain in the United States indefinitely," "work in this country," "return . . . after a temporary absence abroad," and "establish[] a permanent residence in the United States." *Saxbe v. Bustos*, 419 U.S. 65, 72 (1974). Given those and other ramifications, Congress took comfort in the fact that "there is a clear responsibility"—including financial-support obligations—"assumed by citizens and lawful alien residents who have filed petitions for their relatives." S. Rep. No. 89-748, at 15 (1965), 1965 U.S.C.C.A.N. 3328, 3334.

[3] The State Department explicitly recognizes that "social visits to relatives or friends" constitute a valid purpose for the issuance of short-term B-2 visas, available to those traveling for pleasure. *See* 9 U.S. Dep't of State, Foreign Affairs Manual § 402.2-4(A), available at https://fam.state.gov/FAM/09FAM/09FAM040202.html (last visited July 17, 2017).

implementing regulations impose any relationship-based restrictions at all on who may obtain a B visa. The only showing applicants must make—aside from clearing applicable security checks—is that they "hav[e] a residence in a foreign country, which they do not intend to abandon"; they "[i]ntend to enter the United States for a period of specifically limited duration"; and they "seek admission for the sole purpose of engaging in legitimate activities relating to business or pleasure." 9 U.S. Dep't of State, Foreign Affairs Manual § 402.2-2(B); *see* 8 U.S.C. § 1101(a)(15)(B); 22 C.F.R. § 41.31.

Yet the Administration overlooks that grandparents and others whom it categorically excludes from the protection of the modified preliminary injunctions are eligible for—and routinely use—B visas.[4] This Court's opinion, moreover, made clear that the preliminary injunctions extend to those with "close familial relationships" who not only wish to "live with," but also to "visit" a family member in the United States. *IRAP*, 137 S. Ct. at 2088. That grandparents and the other excluded family members are free to visit their

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[4] While the Administration modified its initial guidance to include fiancé(e)s—presumably because that class of relatives is eligible for K-1 non-immigrant visas, *see* 8 U.S.C. § 1184(d)(1); U.S. Citizenship and Immigration Services, Fiancé(e) Visas, https://www.uscis.gov/family/family-us-citizens/fiancee-visa/fiancee-visas (last visited July 17, 2017)—it continues to exclude those relatives who are free to enter the country on B visas.

U.S. relatives on B visas confirms that there is no reason to believe this Court intended to limit its equitable holding to the types of family relationships that can bestow permanent residence. Indeed, the Court's order confirms just the opposite: Mothers-in-law are "clearly" covered by the modified preliminary injunctions, *see IRAP*, 137 S. Ct. at 2088, even though they indisputably qualify as neither "immediate relatives" under INA § 201, nor as family-based immigrants under INA § 203. *See supra* at 7-8 (discussing 8 U.S.C. §§ 1151(b)(2)(A)(i), 1153(a)).[5]

Significantly, even in the context of sponsorship for permanent residence, the INA does not categorically exclude grandparents under all circumstances. *See* 8 U.S.C. § 1183a(f)(5)(B)(i) (allowing an extended family member to serve as a financial sponsor "for humanitarian reasons," when "the individual petitioning [as the sponsor] died after the approval of such petition"); *see also id.* § 1433 (allowing a grandparent to apply for naturalization on behalf of a child born outside of the United States

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[5] The Administration contends that "parents-in-law of persons in the United States will typically also be parents of persons in the United States," thus "plac[ing] the parent-in-law relationship in a fundamentally different position from the other relatives" at issue. Mot. for Clarification of June 26, 2017, Stay Ruling at 35-36. There is no merit to the Administration's suggestion that Dr. Elshikh's "mother-in-law" was covered because she is the "mother" of Dr. Elshikh's wife, rather than the "mother-in-law" of Dr. Elshikh. The Court's sole focus was on Dr. Elshikh—not his wife—and it justified the equitable injunctive relief based on "the concrete burdens that would fall on . . . Dr. Elshikh." *IRAP*, 137 S. Ct. at 2087.

if the parent had died during the preceding five years).

The Government's arbitrary line-drawing thus finds no more support in the INA—a statute that implements "the underlying intention of our immigration laws regarding the preservation of the family unit," H.R. Rep. No. 82-1365, at 29 (1952), *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680; *see Holder v. Martinez Gutierrez*, 132 S. Ct. 2011, 2019 (goals of "'providing relief to aliens with strong ties to the United States'" and "'promoting family unity'" "underlie or inform many provisions of immigration law")—than it does in this Court's order. It should be rejected.

C. The Government's Exclusion from the Preliminary Injunctions of Refugees with a Formal Assurance from a U.S. Resettlement Agency Is Also at Odds with this Court's Order.

According to the Administration, refugees who have a formal assurance from a refugee resettlement agency in the United States are excluded from the protections of the modified preliminary injunctions. *See* Mot. for Clarification of June 26, 2017, Stay Ruling at 10. This, too, flies in the face of this Court's order.

As the Administration acknowledges, before any refugee travels to the United States under the Refugee Program, the Department of State obtains a commitment (an "assurance") from a resettlement agency. *Id.* at 20. As part of its assurance, the resettlement agency agrees that once the refugee

arrives in the United States, the resettlement agency (or a local affiliate) will provide certain government-funded benefits for that refugee. *Id.* at 20-21. The Administration also acknowledges that "[t]he services provided by resettlement agencies and their local affiliates throughout the country include placement, planning, reception, and basic needs and core service activities for arriving refugees." *Id.* at 21.

The relationship thus formed between a refugee and a resettlement agency is surely "bona fide"—that is, "[m]ade in good faith," Black's Law Dictionary, *supra*, at 199. It is "formal, documented, and formed in the ordinary course, rather than for the purpose of evading" the Executive Order. *IRAP*, 137 S. Ct. at 2088. Moreover, as this Court explained, when such a bona fide relationship exists "with a particular person seeking to enter the country as a refugee," the "American individual or entity that has" this relationship "can legitimately claim concrete hardship if that person is excluded." *Id.* at 2089. A hosting resettlement agency suffers such "concrete hardship" when its extensive preparations are stymied because the refugee's entry into the United States has been blocked. The modified preliminary injunctions therefore protect refugees who have assurances from resettlement agencies in the United States.

The Administration nevertheless argues that "[p]rior to the refugee's arrival, . . . the relationship is solely between the government and the agency, not between the agency and the refugee." Mot. for Clarification of June 26, 2017, Stay Ruling at 2.

Whatever the amount of direct contact between the refugee and the resettlement agency prior to a refugee's admission, however, there is no question that the agency's assurance creates a "bona fide relationship" between the two. This is no different than if an American company made a worker an offer of employment through an employment agency or other intermediary. The Court should reject the Government's formalism and its effort to circumvent the protections of this Court's order.

CONCLUSION

For the foregoing reasons, this Court should uphold the district court's decision to enjoin the Administration's guidance, deny the application for a stay of that decision, and reject the Administration's requested "clarification" of this Court's order.

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[6] Counsel for *amici* are grateful for the valuable contributions to this brief of Davis Wright Tremaine summer associate Katherine K. Moy, and Professor Brescia's students (Andrew Carpenter, Elyssa Klein, Mary Ann Krisa, Graham Molho, and Gloria Sprague).